PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUSAN SHADBURNE-VINTON,
Plaintiff-Appellant,

AND

WILLIAM G. VINTON,
Plaintiff,

v. No. 94-1820

DALKON SHIELD CLAIMANTS TRUST,
Defendant-Appellee.

OREGON TRIAL LAWYERS ASSOCIATION; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA; THE AMERICAN INSURANCE ASSOCIATION,
Amici Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frank A. Kaufman, Senior District Judge.
(CA-83-160-K)

Argued: April 6, 1995

Decided: July 26, 1995

Before RUSSELL and WIDENER, Circuit Judges,
and CHAPMAN, Senior Circuit Judge.

Reversed by published opinion. Senior Judge Chapman wrote the opinion, in which Judge Russell joins. Judge Widener wrote a dissenting opinion.

COUNSEL

ARGUED: Michael Albert Pretl, PRETL & ERWIN, P.A., Baltimore, Maryland, for Appellant. Dino Santo Sangiamo, VENABLE, BAETJER & HOWARD, Baltimore, Maryland, for Appellee. **ON BRIEF:** Paul F. Strain, Elizabeth C. Honeywell, VENABLE, BAETJER & HOWARD, Baltimore, Maryland, for Appellee. Arthur C. Johnson, Douglas C. Schaller, JOHNSON, CLIFTON, LARSON & CORSON, P.C., Eugene, Oregon, for Amicus Curiae Oregon Trial Lawyers; Bruce J. Brennan, Marjorie E. Powell, Washington, D.C., for Amicus Curiae Pharmaceutical Research; Robert E. Scott, Jr., Christopher W. Poverman, SEMMES, BOWEN & SEMMES, Baltimore, Maryland, for Amicus Curiae Insurance Association.

OPINION

CHAPMAN, Senior Circuit Judge:

Appellant Susan Shadburne-Vinton ("Shadburne") was injured by a Dalkon Shield Intrauterine Device ("IUD") manufactured by A.H. Robins Company ("Robins") that she

used from March, 1974 until December, 1976. She filed suit against Robins in January, 1983 in the United States District Court for the District of Maryland. Because Shadburne was an Oregon resident, Oregon law controlled, and the district court dismissed her suit under the Oregon statute of repose for failure to timely file. Shadburne appealed the dismissal; however, pending the appeal, Robins entered bankruptcy proceedings, and the bankruptcy court stayed all Dalkon Shield litigation. During the pendency of the bankruptcy proceedings, the Oregon legislature amended the statute of repose to exclude IUD manufacturers as a protected class of defendants.

Following the conclusion of the Robins bankruptcy proceedings in 1989, Shadburne sought to reinstate her initial claim. The Dalkon Shield Claimants Trust ("the Trust," substituted for Robins pursuant to reorganization) agreed to reinstatement, but reserved the right to challenge the amendment to Oregon's statute of repose. The Trust moved for judgment on the pleadings claiming that the amendment violated its due process rights and claiming that the original statute of repose governed Shadburne's suit. On May 19, 1994, the district court granted the Trust's motion, and Shadburne appeals.

For the reasons discussed below, we reverse the district court's ruling.

I.

Shadburne received her first IUD in February, 1973 which was replaced by a second IUD in March, 1974. After an acute episode of pelvic inflammatory disease, the doctor surgically removed the IUD in December, 1976. Shadburne, along with many other plaintiffs, filed suit in Maryland

district court[1] against Robins claiming that the IUD rendered her infertile and caused multiple sclerosis. Because Shadburne and the other plaintiffs were Oregon residents, Oregon's substantive law controlled. Robins moved for judgment on the pleadings on the basis of Oregon's original statute of repose which provided that "a product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption." Or. Rev. Stat. § 30.905(1) (1983) (current version at Or. Rev. Stat. § 30.905(l) (1993)). On December 20, 1984, the district court granted Robins's motion finding that Shadburne filed suit more than eight years after she purchased the IUD. Shadburne and 41 other dismissed plaintiffs appealed.

During the pendency of the appeal, Robins filed for bankruptcy, and the bankruptcy court stayed all Dalkon Shield litigation. In 1987, while the bankruptcy proceedings continued, the Oregon legislature amended the statute of repose to exclude IUD manufacturers[2] as protected defendants. 1987 Or. Laws ch. 4 §§ 5-10. Section 5 applied a two year discovery rule statute of limitations without the eight year repose feature, and section 6 made this rule applicable to all causes of action tried after the statute's effective date. Section 7 described a limitation of July 1,

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1/ Shadburne filed suit in Maryland rather than Oregon because she also sued the Dalkon Shield's inventor, and he was not subject to suit in Oregon.

2/ The Oregon legislature excluded asbestos manufacturers in an earlier amendment, Or. Rev. Stat. § 30.907 (1993), and has since excluded breast implant manufacturers, Or. Rev. Stat. § 30.908 (1993).

1989, for filing such actions, and Sections 8 and 9 established a one year period for refiling actions that were dismissed based upon the prior statute, or to be first commenced within one year after the statute's effective date. Because the Robins bankruptcy proceeding was still not resolved in 1989, the Oregon legislature extended the filing period set forth in the 1987 legislation to actions filed before July 1, 1995. 1989 Or. Laws ch. 642 § 1.[3/] (The 1987 and 1989 statutes are referred to collectively as the "Special IUD Statute.")[4/]

When the Robins bankruptcy proceeding was not concluded by 1989, Shadburne and the Oregon plaintiffs secured a consent order from the bankruptcy court which tolled the time for filing suit under the Special IUD Statute until 30 days after the expiration or termination of the automatic stay.

Many of the other Oregon plaintiffs settled their disputes with the Trust. When the lead appellant, Ada June Tolliver, settled her claim, the Fourth Circuit erroneously dismissed the entire appeal, intending only to dismiss Tolliver's appeal. Shadburne did not file a motion for reconsideration to correct the clerical error and keep her case alive. Shadburne claims that she did not pursue the

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3/ The 1989 amendments made several other minor changes to the 1987 act that are not relevant here. *See* 1989 Or. Rev. Stat. ch. 642.

4/ The Special IUD Statute does not have a code section in the Oregon Code; however, it does appear in the Oregon Code immediately preceding § 30.900 under the title "ACTION AGAINST MANUFACTURER OF INTRAUTERINE DEVICE."

appeal of her earlier dismissal because she deemed the appeal mooted by the Special IUD Statute and the consent order.

Because the parties could not agree to a settlement, the bankruptcy court certified Shadburne's claim, and she filed an amended complaint in the district court on October 27, 1992. The Trust filed a motion for judgment on the pleadings on June 25, 1993, claiming that the Special IUD Statute was unconstitutional, and that under the original statute of repose, Shadburne's claim was properly dismissed. The district court granted the Trust's motion finding that the Special IUD Statute violated the Trust's due process rights under the Federal Constitution, and that the original statute of repose barred Shadburne's claim. Shadburne appeals arguing that the Oregon statute does not violate the Federal Constitution.

We review questions of law *de novo*. *Richmond, Fredericksburg & Potomac R.R. v. United States,* 945 F.2d 765, 768-69 (4th Cir. 1991), *cert. denied,* 503 U.S. 1984 (1992).

II.

The district court found that retroactive enlargement of a statute of limitation does not violate the Due Process Clause of the Constitution, *Chase Sec. Corp. v. Donaldson,* 325 U.S. 304 (1945), yet retroactive enlargement of a statute of repose does. *William Danzer & Co. v. Gulf & Ship Island R.R.,* 268 U.S. 633 (1925). The district court relied primarily upon a Fourth Circuit case that distinguishes statutes of limitation from statutes of repose because the former involve only procedural rights, while the latter involve substantive rights. *Goad v. Celotex Corp.,* 831 F.2d 508 (4th Cir. 1987),

cert. denied, 487 U.S. 1218 (1988). We find *Goad* inapplicable because it separates statutes of limitation from statutes of repose for choice of law purposes, and this case presents a constitutional issue. We find that in analyzing the constitutionality of retroactive legislation, statutes of repose are now treated the same as statutes of limitation.

III.

The Trust relies primarily upon *William Danzer & Co. v. Gulf & Ship Island R.R.,* 268 U.S. 633 (1925), in which the plaintiff failed to file suit against a railroad within the time prescribed by the Interstate Commerce Act, which both created and limited the plaintiff's cause of action. Congress then enacted the Transportation Act which, if applied retroactively, would revive the plaintiff's claim. The railroad argued that reviving the plaintiff's expired cause of action violated its due process rights. The Court found "that the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff." *William Danzer & Co.,* 268 U.S. at 636 (citing *Kansas City S. Ry. v. Wolf,* 261 U.S. 133, 139 (1923); *Louisville Cement Co. v. Interstate Commerce Comm'n,* 246 U.S. 638, 642 (1918); *A.J. Phillips Co. v. Grand Trunk W. Ry.,* 236 U.S. 662, 666 (1915)). The Court further noted that statutes are presumed to be prospective unless the statute expressly states otherwise,[5/] and that it had recently held that the Transportation Act would not apply to causes of action which were barred by a state statute of limitations before the passage of the Act. *Id. (*citing *Fullerton-Krueger Lumber Co. v. Northern Pac. Ry.,* 266 U.S. 435, 437 (1925)). The Court held that sometimes a statute both creates a cause of

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5/ The Oregon statute at issue in the present case expressly states that it applies retroactively.

action and places a limitation period on its existence, and the limitation period in such statutes serve as a limitation upon liability. The Court concluded that the expiration of the time period extinguished the defendant's liability, and to revive that liability would deprive the defendant of its property without due process of law. *Id.* at 637.

The Supreme Court subsequently held in *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945), that retroactive application of a statute of limitation does not violate the Due Process Clause of the Fourteenth Amendment. The *Chase* Court distinguished *Danzer* in a footnote by noting that the statute in that case affected the defendant's liability; whereas, in *Chase* the statutes merely affected the plaintiff's remedy. The challenged statute of limitation neither conferred on plaintiff a new right nor subjected defendant to a new liability. *Chase Sec.* Corp., 325 U.S. at 312, n.8. The Court relied primarily upon its previous decision in *Campbell v. Holt, 115* U.S. 620 (1885), in which it held that

> where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar.

Chase Sec. Corp., 325 U.S. at 311-12. The Court noted that *Campbell* established "that statutes of limitation go to matters of remedy, not to destruction of fundamental rights." *Id.* at 314.

The district court found the Oregon statute of repose unconstitutional based upon *Danzer, Chase, Campbell,* and the Fourth Circuit's decision in *Goad*. *The Goad* court examined the differences between statutes of limitation and statutes of repose.

> Statutes of limitation ... are primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability, although this may be their effect.
>
> In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for acts committed long ago. Statutes of repose make the filing of suit within a specified time a substantive part of plaintiff's cause of action. In other words, where a statute of repose has been enacted, the time for filing suit is engrafted onto a substantive right created by law. The distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws.

Goad, 831 F.2d at 510-11 (footnotes and citation omitted). Although *Goad* delineates the differences between statutes of limitation and statutes of respose, those distinctions are not relevant for purposes of our inquiry in the present case because *Goad* involved choice of law principles, and in that context the distinction between procedural and substantive laws is critical in determining which state's law applies. However, in the present case we are called upon to determine

the constitutionality of a state statute, and we must employ a different analysis.

While *Danzer* and the line of cases discussed above analyzed the constitutionality of retroactive time bar statutes by drawing the substance versus procedure distinction, a more recent line of Supreme Court cases commands us to employ a different analysis. First, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Court rejected appellant's due process challenge to legislation creating a new liability upon coal mine operators for illnesses to miners for work done long before the legislation. The Court recognized:

> it is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.
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> . . . [O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

Id. at 15-16 (citations omitted). The *Usery* Court concluded that the retroactive legislation comported with the requirements of due process.

Next, in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), the Supreme Court upheld a statute imposing liability on employers for withdrawal from pension plans even though the statute applied to employers who withdrew before the enactment of the statute. Relying upon *Usery*, the Court held that legislation imposing liabilities retroactively must only be supported by a rational legislative purpose. *Id.* at 728-30.

Finally, in *General Motors Corp. v. Romein,* the Court held that in order for retroactive state legislation to comport with the requirements of due process under the Fifth Amendment, it must serve a legitimate legislative purpose that is furthered by rational means. 503 U.S. 181, 191 (1992) (citing *Pension Benefit Guar. Corp.*, 467 U.S. at 730).

Turner Elkhorn and Pension Benefit both involved federal statutes, and *Romein* involved a state statute. Thus, the three cases together stand for the proposition that the Due Process Clause of the Fifth Amendment allows retroactive application of either federal or state statutes as long as the statute serves a legitimate legislative purpose that is furthered by rational means. We reject the district court's inference that *Turner Elkhorn* and *Pension Benefit* only apply to federal statutes involving national economic policy. While courts might accord a stronger deference to legislation affecting national economic policy, that does not suggest that a different constitutional analysis applies to non-economic legislation. Courts apply the rational basis test when reviewing the constitutionality of retroactive legislation in general, but the legislative deference may vary.

In light of this more recent Supreme Court precedent, we find that the analysis used by the Court in *Danzer, Chase,* and *Campbell* is outdated and no longer valid for purposes of

analyzing the constitutionality of retroactive legislation. The relevant inquiry is whether or not the legislation serves a legitimate legislative purpose that is furthered by rational means. In fact, the Fourth Circuit applied the reasoning of *Turner Elkhorn* in *United States v. Monsanto Co.,* 858 F.2d 160, 174 (4th Cir. 1988), *cert. denied,* 490 U.S. 1106 (1989), in determining that retroactive application of CERCLA's liability provisions does not run afoul of the Supreme Court's test for due process validity.

Our sister circuit recently considered whether retroactive application of a statute of repose violates a defendant's due process rights in *Wesley Theological Seminary v. United States Gypsum Co.,* 876 F.2d 119 (D.C. Cir. 1989), *cert. denied,* 494 U.S. 1003 (1990), and we follow the reasoning of the *Wesley* court. In that case, the defendant claimed that the ten year statute of repose barred the plaintiff's suit; however, while the case was pending, the legislature amended the statute making it inapplicable to manufacturers such as the defendant. The defendant argued that the earlier statute conferred upon it a substantive right not to be sued, and that retroactive application of the amended statute of repose violated its due process rights.

Relying upon *Turner Elkhorn* and *Pension Benefit,* the D.C. Circuit reasoned that retroactive application of the amended statute did not violate the defendant's due process rights if it served a rational legislative purpose. *Id.* at 122-23. The *Wesley* court noted that "any substance/procedure dichotomy suggested by *Chase* is either completely defunct or, at the very most, establishes procedural rules as a safe harbor within which a legislature may freely make retroactive changes." *Id.* at 122. The *Wesley* court stated that *Turner Elkhorn* and *Pension Benefit* followed Justice Holmes's view that legislative bodies are vested with a

certain amount of leeway in establishing laws. As Chief Justice of Massachusetts, Justice Holmes wrote:

> [M]ultitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.

Danforth v. Groton Water Co., 59 N.E. 1033, 1034 (Mass. 1901), *quoted in Wesley*, 876 F.2d at 121.

In predicting that the Fourth Circuit would not follow the D.C. Circuit's opinion in *Wesley*, the district court relied upon *Link v. Receivers of Seaboard Air Line Railway*, 73 F.2d 149 (4th Cir. 1934), and *Dinh v. Rust International Corp.*, 974 F.2d 500 (4th Cir. 1992). We find both of these cases inapplicable in resolving the constitutional issue before us.

The statute in *Link* provided that personal injury judgments against railroads took priority over any mortgage payments owed by the railroad as long as the personal injury plaintiff filed suit within twelve months of the injury. Link filed his suit eighteen months after his injury; however, while his appeal was pending, the legislature amended the statute to allow personal injury plaintiffs two years in which to file suit. Link argued that the amended statute applied in his case giving his judgment priority. The court held that application of the amendment to pending suits violated the railroad's due process rights because once the twelve month period expired, the plaintiff's personal injury judgment lost priority over the railroad's mortgages. The court determined that the

legislature could not revive a substantive right already lost by the plaintiff. *Link*, 73 F.2d at 152. The court also noted that the legislature did not intend for the amendment to apply retroactively. *Id.* at 151.

We find *Link* inapplicable in the present case because the Fourth Circuit decided that case in 1934 and, as discussed above, the Supreme Court has since made substantial changes in this area of the law. *Link* is based upon the same outdated principles upon which *Danzer* is based.

The district court's reliance upon *Dinh* is misplaced because in that case the appellant *agreed* that the statute of repose created substantive rights in the defendant which once vested could not be legislatively destroyed. *Dinh*, 974 F.2d at 501. Because the issue was not contested, it was not before the court.

The Trust relies upon *School Board of Norfolk v. United States Gypsum Co.*, 360 S.E.2d 325 (Va. 1987), in which the court found that retroactive application of a statute of repose violated the defendant's due process rights under the Virginia Constitution. Because the court decided *United States Gypsum Co.* under Virginia's Constitution, not the Federal Constitution, and because states are free to interpret their constitutions under a stricter standard than the federal courts interpret the Federal Constitution, we find *United States Gypsum Co.* inapplicable here.

The Trust also relies upon *Colony Hill Condominium I Ass'n v. Colony Co.*, 320 S.E.2d 273 (N.C. Ct. App. 1984), *review denied*, 325 S.E.2d 485 (N.C. 1985), in which the court held that a statute of repose provided the defendant with a vested right not to be sued and reviving a

liability already extinguished violated the defendant's due process rights. As a state appellate decision, *Colony Hill* is not binding authority on this court, and we decline to follow it because it does not recognize the recent changes in this area of the law triggered by the Supreme Court's decisions in *Turner Elkhorn* and *Pension Benefit*.

The recent developments in the law require us to apply the rational basis test in determining whether retroactive legislation violates the Due Process Clause of the Fifth Amendment. For purposes of constitutional analysis, the same test applies regardless of whether the statute at issue is one of repose or one of limitation.

Next, we must determine whether the Oregon statute of repose, which expressly states that it applies retroactively, serves a legitimate legislative purpose that is furthered by rational means. After extensive hearings on the legislation, the Oregon legislature determined that retroactive application of the Special IUD Statute was fair and equitable to all parties involved. Because many of the women suffered injuries from the IUD in the early to mid 1970s, and the link between the IUD and the injuries it caused was not discovered until the early 1980s, the unamended statute of repose barred the claims of many women. The Oregon Legislature determined that the Special IUD Statute was necessary to provide these claimants with a fair opportunity to litigate their claims. We find that the Special IUD statute does not violate the Due Process Clause of the Fifth Amendment because it is rationally related to a legitimate legislative purpose.

For the foregoing reasons, the opinion of the district court is

REVERSED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I would affirm on the opinion of the district court, the pertinent part of which opinion is copied below and which I adopt as my own. I would consider any of its particular language altered only enough to fit the changed circumstances of its use by me.

* * * *

Although the constitutional impediments to expressly retroactive legislation are "of limited scope," such legislation will not pass constitutional muster if it runs afoul of the Fourteenth Amendment by depriving a person of life, liberty, or property without due process of law. *See Landgraf v. USI Film Products*, 62 U.S.L.W. 4255, 4262, 128 L. Ed. 2d 229 (1994). It is undisputed that a legislature may in certain instances retroactively enlarge a statute of limitations without violating the Constitution. *International Union of Electrical, etc. v. Robbins & Myers, Inc.*, 429 U.S. 229, 243 (1976); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-12 (1945); *Campbell v. Holt*, 115 U.S. 620 (1885).[6/]

[6/] "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking

Retroactive enlargement in such a situation is unproblematic because "statutes of limitation go to matters of remedy, not to destruction of fundamental rights." *Chase*, 325 U.S. at 314. However, "where a statute in creating a liability also put[s] a period to its existence, a retroactive extension of the period after its expiration amount[s] to a taking of property without due process of law." *Id.*, at 311 n.8 (citing *William Danzer Co. v. Gulf & Ship Island R.R. Co.*, 268 U.S. 633, 636-37 (1925)). In *Danzer*, the Supreme Court refused to permit a plaintiff who failed to file timely under a two-year federal limitations period to take advantage of a later statute permitting suspension of the timeliness requirement in certain circumstances. The original statute had been previously determined, in other cases, to constitute not only a bar to a remedy, but also a destruction of defendant's liability to plaintiff. 268 U.S. at 636. Therefore, upon expiration of the two-year period for filing, "it was as if liability had never existed." *Id.* Thus by virtue of *Chase* and *Danzer*, the Supreme Court has distinguished between retroactive enlargement of statutes which effect only remedy and those which effect liability, upholding the former while refusing to uphold the latter.

> of life, liberty or property without due process of law. . . .Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment."

Chase, 325 U.S. at 315-16.

As both parties agree, the statute which has been retroactively enlarged in this case, ORS 30.905, is a statute of repose. Unlike a statute of limitations which generally runs from the time a cause of action accrues, the statute of repose in this case runs from the date the product was first purchased. As Judge Northrop explained in *Pottratz*, "this statute does not operate to bar a remedy; it prevents a cause of action from ever arising." 588 F. Supp. at 952. In other words, injury which occurs more than eight years after the product is purchased, "'forms no basis for recovery. The injured party literally has *no* cause of action.'" *Id.* (quoting *President and Directors of Georgetown College v. Madden*, 505 F. Supp. 557, 573 (D. Md. 1980), *aff'd in part and appeal dismissed in part*, 660 F.2d 91 (4th Cir. 1981)). The policies identified by Judge Northrop which underlay a statute of repose are "first, that there is a lack of reliability and availability of evidence after a lapse of a long period of time and secondly, that people are entitled to plan their affairs with certainty, free from the disruptive burden of protracted and unknown potential liability." *Id.* at 953 (citing *Johnson v. Star Machinery Co.*, 270 Or. 694 (1974)).

The Fourth Circuit has explained the differences between statutes of limitation, which are procedural, and statutes of repose, which are substantive.

> "Statutes of limitation . . . are primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability, although this may be their effect.
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> In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for

> acts committed long ago. Statutes of repose make the filing of suit within a specified time a substantive part of plaintiff's cause of action.... In other words, *where a statute of repose has been enacted, the time for filing suit is engrafted onto a substantive right created by law.* The distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws. Statutes of repose are meant to be 'a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.'"

Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987) (footnotes omitted) (emphasis added) (citing *Bolick v. American Barmag Corp.*, 293 S.E.2d 415, 418 (N.C. 1982)), *cert. denied*, 487 U.S. 1218 (1988).

Danzer has never been overruled by the Supreme Court; rather later cases such as *Chase* and *Robbins & Myers* are testament to its continued vitality, since the opinions in those cases expressly distinguish themselves from the substantive impairment found in *Danzer*. Nonetheless, plaintiff argues that *Danzer* is no longer valid law and that the substance/procedure distinction drawn in that case is equally untenable. Plaintiff relies largely on *Wesley Theological Seminary of United Methodist Church v. United States Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).[7] In that case Wesley

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[7] Plaintiff also relies on *Independent School Dist. No. 197 v. W.R.*

sued Gypsum for providing Wesley with building tiles which contained asbestos. In defense, Gypsum asserted that Wesley's claim was time-barred because the injury alleged did not occur within ten years after the defective improvement to the property, as required under the District of Columbia's statute of repose. However, while the ,case was pending, an amendment to the time-bar statute provided that the statute was inapplicable to manufacturers such as Gypsum. Relying on the earlier time-bar statute, the district court granted partial summary judgment for Gypsum, reasoning that the statute of repose conferred upon Gypsum a substantive right not to be sued. The Court of Appeals reversed.

The D.C. Circuit rejected the defendant's argument that "changes in purely procedural provisions may be retroactive while changes in substantive ones may not." 876 F.2d at 121. The Court relied heavily *on Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976), and *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717 (1984), two Supreme Court cases which did not accept due process challenges to expressly retroactive statutes. Under those cases, retroactive economic legislation need only be justified by "a rational legislative purpose" to survive constitutional review. *Pension Benefit,* 467 U.S. at 730. According to the

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Grace & Co., 752 F. Supp. 286 (D. Minn. 1990), which cites to

and relies largely upon the D.C. Circuit's opinion in *Wesley.*

Thus, while the following discussion addresses the opinion in

Wesley, it is also applicable to *W.R. Grace.*

Court in *Wesley,* the import of *Usery and Pension Benefit* is that "any substance procedure dichotomy suggested by *Chase* is either completely defunct or, at the very most, establishes procedural rules as a safe harbor within which a legislature may freely make retroactive changes." 876 F.2d at 122. The Court in *Wesley,* acknowledged that "there are real distinctions between a statute of limitation and one of repose," but that "we need not tarry with these theoretical points. Even if they proved that statutes of repose were substantive it would not advance our resolution of the constitutional claim." *Id.* at 122-23.

Unlike the D.C. Circuit, however, the Fourth Circuit has not so rejected the distinction between substance and procedure. As the *Goad* case demonstrates, *see supra,* the Fourth Circuit views the differences between statutes of limitation and statutes of repose as corresponding "to the distinction between procedural and substantive laws." 831 F.2d at 511. Further, in the Fourth Circuit, the differences between those two types of timeliness statutes are not viewed as "metaphysical." *Wesley,* 876 F.2d at 122. Rather, the Court in *Goad* stated that,

> "this distinction does not exalt form over substance, nor does it subject the Constitution to the whims of the States in labeling their laws. . . . [T]he labels serve a useful purpose in describing the various interests underlying the two types of laws. 'The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid differences between rules in which stability is of prime

> importance and those in which flexibility is a more important value.'"

Id. (quoting *Chase*, 325 U.S. at 314).

Additionally, as defendant notes, the opinion in *Wesley* does not specifically mention the Supreme Court's decision in *Danzer*. In contrast to the D.C. Circuit, the Fourth Circuit has continued to adhere to the line initially drawn in *Danzer* and later upheld in *Chase*. In *Link v. Receivers of Seaboard Air Line Ry. Co.*, 73 F.2d 149, 152 (4th Cir. 1934), Judge Parker, partly in reliance on *Danzer*, stated that "where a right of recovery has been lost by reason of failure to institute action within the period limited as a condition of the right, it is not revived by a statute subsequently enacted extending the period." *Id.* at 152. Such a situation differs from a "repeal of a mere statute of limitations affecting the remedy." *Id.*

In its most recent statement concerning this issue, the Fourth Circuit again affirmed the principle stated in *Danzer*. In *Dinh v. Rust International Corp.*, 974 F.2d 500 (4th Cir. 1992), plaintiff was injured in an industrial accident in 1989 by a machine which had been installed in 1959. Virginia's statute of repose, enacted in 1964, provided that any action against a person responsible for an improvement to real property must be brought within five years after the allegedly defective improvement had been made. Later amendments to that statute provided that the statute's five-year limitation did not apply to manufacturers of machinery such as defendants. The district court granted summary judgment to defendants, reasoning that the 1964 statute of repose applied to the machinery and that therefore defendants "obtained *vested* rights of repose prior to enactment of the" amendments. *Id.* at 501. Although on appeal plaintiff did

"not argue for a retroactive application" of the amendments, the Fourth Circuit affirmed the district court's conclusion in that regard, stating that "the statute of repose creates *substantive* rights in potential defendants, which, once vested, may not be legislatively destroyed." *Id.* (citing *School Bd. of City of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32 (1987)).[8/] Thus, the Fourth Circuit appears to follow the substance/procedure distinction drawn by the Supreme Court to a considerably greater degree than the D.C. Circuit; this Court cannot and does not apply *Wesley's* approach.[9/]

Moreover, even if this Court were otherwise to consider the import *of Wesley,* without regard to the Fourth Circuit's caselaw, it would appear that the Supreme Court cases relied upon by the Court in *Wesley* do not bear directly on the narrow issue at hand. In *Usery,* the Supreme court approved retroactive application of a congressional statute which imposed a new liability upon coal mine operators for the death or illness of miners caused by coal dust, including those miners whose work terminated before passage of the act. In *Pension Benefit,* the Supreme court approved retroactive application of an act which amended parts of ERISA by placing retroactive liability upon employers who withdraw from multi-employer pension plans. The statutes

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8/ The plaintiff contended on appeal that the 1964 statute did not apply to the improvements completed prior to the enactment of that statute. The Fourth Circuit rejected that argument.

9/ *See also David v. Valley Distrib. Co.*, 522 F.2d 827, 830 n.7 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977) (explaining difference between *Danzer* and *Chase*); *Starks v. S.E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982) (same).

at issue in *Usery* and *Pension Benefit* established complex regulatory schemes "in the field of national economic policy." *Pension Benefit,* 467 U.S. at 729. In contrast, the Oregon Special IUD Statute relates principally to the timeliness aspect of state common law rights and duties which exist solely with regard to private parties. Thus, it would appear that the decision in *Danzer, Chase, and Robbins & Myers* deal more closely with the issue involved in this case. Accordingly, this Court relies upon *Danzer, Chase,* and *Robbins & Myers* without giving the effect suggested by *Wesley* to the broader statements contained in *Usery* and *Pension Benefit* - statements which themselves appear to pertain to different sorts of statutory schemes than those at issue in the within case.

Accordingly, in the light of Supreme Court caselaw and the Fourth Circuit statements on this issue, this Court holds that the Oregon Special IUD statute is unconstitutional. Under the Oregon Statute of Repose, Ms. Shadburne's claim is untimely and thus, defendant's motion for judgment on the pleadings will be granted in a separate Order of even date herewith.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SUSAN SHADBURNE	*	
V.	*	CIVIL NO. K-83-160
DALKON SHIELD CLAIMANTS TRUST	*	
	*	

Filed: May 19, 1994

Michael A. Pretl, Esquire and H. Robert Erwin, Esquire, Pretl & Erwin, P.A., of Baltimore, Maryland, for plaintiff.

Paul F. Strain, Esquire, Elizabeth C. Honeywell, Esquire and Dino S. Sangiamo, Esquire, Venable, Baetjer & Howard, of Baltimore, Maryland, for defendant.

KAUFMAN, Senior District Judge.

On March 1, 1974, plaintiff, Susan Shadburne, received a Dalkon Shield intrauterine contraceptive which was manufactured and sold by A. H. Robins, Inc. She filed suit in this Court on January 20, 1983, alleging that she had been injured by the use of the Dalkon Shield. At that latter date, the Oregon statute of repose, ORS 30.905, provided that "a product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption." On December 20, 1984, this Court granted Robins' motion for summary judgment with regard to Shadburne, holding that because plaintiff did not file suit within eight years of receiving her

Dalkon Shield, her suit was barred under the Oregon statute of repose. In re Dalkon Shield Cases, 599 F. Supp. 1351, 1356-57 (D. Md. 1984). The decision of Judge Northrop in those Dalkon Shield Cases was largely based on his earlier opinion in Pottratz v. Davis, 588 F. Supp. 949, 953 (D. Md. 1984), in which he held that "the Oregon statute is an ultimate statute of repose which is part of the substantive law of Oregon." Because Maryland applies the substantive law of the state in which a wrong occurs, and because the Oregon statute of repose is substantive, the court in Pottratz determined that under this Court's choice-of-law principles, the Oregon statute of repose governed a Dalkon Shield claim which arose in Oregon.

Shadburne, along with several other plaintiffs, appealed Judge Northrop's ruling in Dalkon Shield Cases to the United States Court of Appeals for the Fourth Circuit. On August 21, 1985, while that case was on appeal in that Court, Robins filed a petition for bankruptcy in the United States District Court for the Eastern District of Virginia, thus staying all of the Dalkon Shield litigation. During the continued pendency of Ms. Shadburne's appeal, Oregon enacted a statute providing that the Oregon State [sic] of Repose "shall not apply to a product liability civil action against a manufacturer of an intrauterine device, resulting in IUD-related injuries." Or. Laws 1989 c. 642 § 2 ("Special IUD Statute"). Instead, the statute provided that a plaintiff must file suit against an IUD manufacturer "not later than two years after the date on which the plaintiff discovered, or, in the exercise of reasonable care, should have discovered" her injury. § 3. The Act further provided that it applied to "any product liability civil action against a manufacturer of an intrauterine device currently pending in the trial court or

on appeal, in which the defendant manufacturer has raised the statute of limitations or repose as a defense." § 4.[10/]

In reliance upon the enactment of the Special IUD Statute, several Oregon claimants commenced an adversary proceeding against Robins in the aforementioned Bankruptcy Court. As stated in a Consent Order submitted to that

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10/ In 1987, the Oregon legislature exempted IUD cases from the statute of repose and provided in part that:

> Notwithstanding ORS 30.905, a product liability civil action against the manufacturer of an intrauterine contraceptive device shall be commenced not later than two years after the date on which the plaintiff first discovered, or in the exercise of reasonable care should have discovered, the injury and the cause of the injury.

Or. Laws 1987 c.4 § 5. The Act prescribed an outside date of July 1, 1989, for filing such actions, and also provided that actions which had been dismissed under ORS 30.905 could be refiled within one year of the effective date of the 1987 Act. §§ 7, 8. Further, actions against IUD manufacturers for IUD's purchased more than eight years before the effective date of the 1987 Act which had never been commenced could be filed within one year from the Act's effective date. § 9. According to plaintiff, because the Robins bankruptcy had not been resolved by the July 1, 1989 cutoff date, the Oregon legislature enacted the 1989 legislation.

Bankruptcy Court, the claimants were concerned that "any rights afforded them by the Oregon Special IUD Statute . . . not be lost due to the pendency of the automatic stay." On May 5, 1989, the said Bankruptcy Court signed the aforementioned Consent Order which provided: "The periods set forth in the Oregon Special IUD Statute for filing suit against Robins or the Trust on Dalkon Shield-related personal injury claims, if legal and applicable, are tolled until thirty days after expiration or termination of the automatic stay."

The Order also stated:

> "The Court expressly reserves judgment on any and all other issues arising from the referenced Oregon statues or which are and could have been raised in this adversary proceeding including, without limitation, issues relating to the constitutionality, validity, or enforceability of the Oregon Special IUD Statute or its retroactive effect. . ."

On December 13, 1989, this Court entered an order administratively closing all Dalkon Shield claims then pending, subject to a claimant's motion for reinstatement. Defendant emerged from bankruptcy on December 15, 1989.[11/] On October 23, 1991, the Fourth Circuit dismissed

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11/ Under the post-bankruptcy plan of reorganization, a Dalkon Shield Claimants Trust was created in which $2.3 billion was deposited for resolution of Dalkon

the Oregon claimants' appeal to which Shadburne had been a party because one of the co-appellants had settled her claim. Ms. Shadburne completed the Claims Resolution process without settling, and on October 21, 1992, the Bankruptcy Court certified plaintiff to proceed with litigation in this case. This Court granted plaintiff's motion to reinstate this case on October 30, 1992.

The Trust filed a motion for judgment on the pleadings on June 25, 1992, challenging the constitutionality of the Special IUD statute under the federal and Oregon constitutions. At a motions hearing held in chambers on December 15, 1993, this Court raised the question of whether it lacked jurisdiction over this case in the light of the Fourth Circuit's dismissal of the Oregon claimants' appeal. In a Memorandum and Order dated December 27, 1993, this Court stayed all proceedings in this case until counsel advised this Court concerning future presentation of that issue to the Fourth Circuit. On February 25, 1994, the Fourth Circuit determined that Ms. Shadburne's appeal had been dismissed in error, recalled its mandate, and remanded this case back to this Court, insofar as it relates to Ms. Shadburne. Accordingly, this Court must now decide defendant's motion for judgment on the pleadings, in connection with the issue of whether the Oregon Special IUD

Shield claims. In addition, a Claims Resolution Facility was established pursuant to which the Trust attempted to settle claims with individual claimants. Upon exhaustion of the Claims Resolution procedures, if a settlement agreement is not reached with an individual claimant, the Trust asks the Bankruptcy Court to certify that the claimant has completed the claims resolution process and may thereafter pursue litigation.

Statute, which expressly applies retroactively to revive claims extinguished by the prior Oregon Statute of Repose, is constitutional under the federal Constitution.[12/]

LAW

Although the constitutional impediments to expressly retroactive legislation are "of limited scope," such legislation will not pass constitutional muster if it runs afoul of the Fourteenth Amendment by depriving a person of life, liberty, or property without due process of law. See Landsgraf v. USI Film Products., 62 U.S.L.W. 4255, 4262, 128 L. Ed.2d 229 (1994). It is undisputed that a legislature may in certain instances retroactively enlarge a statute of limitations without violating the Constitution. International Union of Electrical, etc., v. Robbins & Myers, Inc., 429 U.S. 229, 243 (1976); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 311-12 (1945); Campbell v. Holt, 115 U.S. 620 (1885).[13/]

12/ In their Supplemental Memorandum, defendant states that if this Court desires to certify to the Oregon Supreme Court the question of the constitutionality of the Oregon statute under the Oregon constitution, defendant would like to drop its state constitutional challenge. Accordingly, in a Memorandum to Counsel dated May 4, 1994, this Court stated that it understood, for purposes of this case, that defendant is conceding the constitutionality of the Oregon statute under the Oregon constitution. Thus, the constitutionality of the statute under the Oregon constitution is not challenged in connection with defendants' pending motion.

13/ The Fourteenth Amendment does not make an act of state "legislation void merely because it has some

Retroactive enlargement in such a situation is unproblematic because "statutes of limitation go to matters of remedy, not to destruction of fundamental rights." Chase, 325 U.S. at 314. However, "where a statute in creating a liability also put[s] a period to its existence, a retroactive extension of the period after its expiration amount[s] to a taking of property without due process of law." Id., at 311 n.8 (citing William Danzer Co. v. Gulf & Ship Island R.R. Co., 268 U.S. 633, 636-37 (1925)). In Danzer, the Supreme Court refused to permit a plaintiff who failed to file timely under a two-year federal limitations period to take advantage of a later statute permitting suspension of the timeliness requirement in certain circumstances. The original statute had been previously determined, in other cases, to constitute not only a bar to a remedy, but also a destruction of defendant's liability to plaintiff. 268 U.S. at 636. Therefore, upon expiration of the two-year period for filing, "it was as if liability had never existed." Id. Thus, by virtue of Chase and Danzer, the Supreme Court has distinguished between retroactive enlargement of statutes which effect only remedy and those

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> retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment."
>
> Chase, 325 U.S. at 315-16.

which effect liability, upholding the former while refusing to uphold the latter.

As both parties agree, the statute which has been retroactively enlarged in this case, ORS 30.905, is a statute of repose. Unlike a statute of limitations which generally runs from the time a cause of action accrues, the statute of repose in this case runs from the date the product was first purchased. As Judge Northrop explained in Pottratz, "this statute does not operate to bar a remedy; it prevents a cause of action from ever arising." 588 F. Supp. at 952. In other words, injury which occurs more than eight years after the product is purchased, "'forms no basis for recovery. The injured party literally has no cause of action.'" Id. (quoting President and Directors of Georgetown College v. Madden, 505 F. Supp. 557, 573 (D. Md. 1980), aff'd in part and appeal dismissed in part, 660 F.2d 91 (4th Cir. 1981)). The policies identified by Judge Northrop which underlay a statute of repose are "first, that there is a lack of reliability and availability of evidence after a lapse of a long period time and secondly, that people are entitled to plan their affairs with certainty, free from the disruptive burden of protracted and unknown potential liability." Id. at 953 (citing Johnson v. Star Machinery Co., 270 Or. 694 (1974)).

The Fourth Circuit has explained the differences between statutes of limitation, which are procedural, and statutes of repose, which are substantive.

> "Statutes of limitation . . . are primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability, although this may be their effect.

> In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for acts committed long ago. Statutes of repose make the filing of suit within a specified time a substantive part of plaintiff's cause of action . . . . In other words, where a statute of repose has been enacted, the time for filing suit is engrafted onto a substantive right created by law. The distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws. Statues of repose are meant to be 'a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.'"

Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987) (footnotes omitted) (emphasis added) (citing Bolick v. American Barmag Corp., 293 S.E.2d 415, 418 (N.C. 1982)), cert. denied, 487 U.S. 1218 (1988).

Danzer has never been overruled by the Supreme Court; rather, later cases such as Chase and Robbins & Myers are testament to its continued vitality, since the opinion in those cases expressly distinguish themselves from the substantive impairment found in Danzer. Nonetheless, plaintiff argues that Danzer is no longer valid law and that the substance/procedure distinction drawn in that case is

equally untenable. Plaintiff relies largely on Wesley Theological Seminary of United Methodist Church v. United States Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989), cert. denied, 494 U.S. 1003 (1990).[14/] In that case, Wesley sued Gypsum for providing Wesley with building tiles which contained asbestos. In defense, Gypsum asserted that Wesley's claim was time-barred because the injury alleged did not occur within ten years after the defective improvement to the property, as required under the District of Columbia's statute of repose. However, while the case was pending, an amendment to the time-bar statute provided that the statute was inapplicable to manufacturers such as Gypsum. Relying on the earlier time-bar statute, the district court granted partial summary judgment for Gypsum, reasoning that the statute of repose conferred upon Gypsum a substantive right not to be sued. The Court of Appeals reversed.

The D.C. Circuit rejected the defendant's argument that "changes in purely procedural provisions may be retroactive while changes in substantive ones may not." 876 F.2d at 121. The Court relied heavily on Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) and Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984), two Supreme Court cases which did not accept due process challenges to expressly retroactive statutes. Under those cases, retroactive economic legislation need only be justified

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14/ Plaintiff also relies on Independent School Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286 (D. Minn. 1990), which cites to and relies largely upon the D.C. Circuit's opinion in Wesley. Thus, while the following discussion addresses the opinion in Wesley, it is also applicable to W.R. Grace.

by "a rational legislative purpose" to survive constitutional review. Pension Benefit, 467 U.S. at 730. According to the Court in Wesley, the import of Usery and Pension Benefit is that "any substance/procedure dichotomy suggested by Chase is either completely defunct or, at the very most, establishes procedural rules as a safe harbor within which a legislature may freely make retroactive changes." 876 F.2d at 122. The Court in Wesley acknowledged that "there are real distinctions between a statute of limitation and one of repose," but that "we need not tarry with these theoretical points. Even if they proved that statutes of repose were substantive it would not advance our resolution of the constitutional claim." Id. at 122-23.

Unlike the D.C. Circuit, however, the Fourth Circuit has not so rejected the distinction between substance and procedure. As the Goad case demonstrates, see supra, the Fourth Circuit views the differences between statutes of limitation and statutes of repose as corresponding "to the distinction between procedural and substantive laws." 831 F.2d at 511. Further, in the Fourth Circuit, the differences between those two types of timeliness statutes are not viewed as "metaphysical." Wesley, 876 F.2d at 122. Rather, the Court in Goad stated that,

> "this distinction does not exalt form over substance, nor does it subject the Constitution to the whims of the States in labeling their laws . . . [T]he labels serve a useful purpose in describing the various interests underlying the two types of laws. 'The abstract logic of the distinction between substantive rights and remedial or procedural rights may

> not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value.'"

Id. (quoting Chase 325 U.S. at 314).

Additionally, as defendant notes, the opinion in Wesley does not specifically mention the Supreme Court's decision in Danzer. In contrast to the D.C. Circuit, the Fourth Circuit has continued to adhere to the line initially drawn in Danzer and later upheld in Chase. In Link v. Receivers of Seaboard Air Line Ry. Co., 73 F.2d 149, 152 (4th Cir. 1934), Judge Parker, partly in reliance on Danzer, stated that "where a right of recovery has been lost by reason of failure to institute action within the period limited as a condition of the right, it is not revived by a statute subsequently enacted extending the period." Id. at 152. Such a situation differs from a "repeal of a mere statute of limitations affecting the remedy." Id.

In its most recent statement concerning this issue, the Fourth Circuit again affirmed the principle stated in Danzer. In Dinh v. Rust International Corp., 974 F.2d 500 (4th Cir. 1992), plaintiff was injured in an industrial accident in 1989 by a machine which had been installed in 1959. Virginia's statute of repose, enacted in 1964, provided that any action against a person responsible for an improvement to real property must be brought within five years after the allegedly defective improvement had been made. Later amendments to that statute provided that the statute's five-year limitation did not apply to manufacturers of machinery such as

defendants. The district court granted summary judgment to defendants, reasoning that the 1964 statute of repose applied to the machinery and that therefore defendants "obtained vested rights of repose prior to enactment of the" amendments. Id. at 501. Although on appeal plaintiff did "not argue for a retroactive application" of the amendments, the Fourth Circuit affirmed the district court's conclusion in that regard, stating that "the statute of repose creates substantive rights in potential defendants, which, once vested, may not be legislatively destroyed." Id. (citing School Bd. of City of Norfolk v. U.S. Gypsum Co., 234 Va. 32 (1987)).[15/] Thus, the Fourth Circuit appears to follow the substance/procedure distinction drawn by the Supreme Court to a considerably greater degree than the D.C. Circuit; this Court cannot and does not apply Wesley's approach.[16/]

Moreover, even if this Court were otherwise to consider the import of Wesley without regard to the Fourth Circuit's caselaw, it would appear that the Supreme Court cases relied upon by the Court in Wesley do not bear directly on the narrow issue at hand. In Usery, the Supreme Court approved retroactive application of a congressional statute which imposed a new liability upon coal mine operators for the death or illness of miners caused by coal dust, including

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15/ The plaintiff contended on appeal that the 1964 statute did not apply to the improvements completed prior to the enactment of that statute. The Fourth Circuit rejected that argument.

16/ See also Davis v. Valley Distrib. Co., 522 F. 2d 827, 830 n.7 (9th Cir. 1975), cert. denied, 429 U.S. 1090 (1977) (explaining difference between Danzer and Chase); Starks v. S.E. Rykoff & Co., 673 F.2d 1106, 1109 (9th Cir. 1982) (same).

those miners whose work terminated before passage of the act. In Pension Benefit, the Supreme Court approved retroactive application of an act which amended parts of ERISA by placing retroactive liability upon employers who withdrew from multi-employer pension plans. The statutes at issue in Usery and Pension Benefits established complex regulatory schemes "in the field of national economic policy." Pension Benefits, 467 U.S. at 729. In contrast, the Oregon Special IUD Statute relates principally to the timeliness aspect of state common law rights and duties which exist solely with regard to private parties. Thus, it would appear that the decisions in Danzer, Chase, and Robbins & Myers deal more closely with the issue involved in this case. Accordingly, this Court relies upon Danzer, Chase, and Robbins & Myers without giving the effect suggested by Wesley to the broader statements contained in Usery and Pension Benefit -- statements which themselves appear to pertain to different sorts of statutory schemes than those at issue in the within case.

Accordingly, in the light of Supreme Court caselaw and the Fourth Circuit statements on this issue, this Court holds that the Oregon Special IUD statute is unconstitutional. Under the Oregon Statute of Repose, Ms. Shadburne's claim is untimely and thus, defendant's motion for judgment on the pleadings will be granted in a separate Order of even date herewith.

/s/ Frank A. Kaufman

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SUSAN SHADBURNE	*	
V.	*	CIVIL NO. K-83-160
DALKON SHIELD CLAIMANTS TRUST	*	

ORDER

Judgment is hereby entered for defendant. It is so ORDERED this 19th day of May 1994.

/s/ Frank A. Kaufman

Senior United States District Judge

FILED: February 25, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1189

SUSAN SHADBURNE,

Plaintiff-Appellant,

versus

HUGH J. DAVIS, M.D.; DALKON SHIELD CLAIMANTS TRUST

Defendants-Appellees.

ORDER

We have before us the motion of Mrs. Shadburne to recall our mandate in this case, which dismissed her appeal with prejudice, and the response of the Dalkon Shield Claimants Trust opposing the motion.

After an examination of the papers submitted in this case and those in the court's files, we are of opinion that Mrs. Shadburne's appeal was dismissed in error. The error occurred because Mrs. Shadburne's appeal was taken with that of Mrs. Toliver and this appeal was consolidated for briefing and oral argument with that of Mrs. Pottratz, No. 84-2004. Mrs. Toliver settled with the Trust and moved this court for an order of voluntary dismissal with prejudice in her case. Mrs. Shadburne never settled with the Trust. Because Mrs. Toliver's was the lead case, forty-two of the appeals taken with hers were mistakenly dismissed with prejudice in this court's order filed on October 24, 1991. We therefore find that the interests of justice require that we recall our mandate in the case only insofar as it includes Mrs. Shadburne, vacate our order of dismissal only insofar as it includes Mrs. Shadburne, and remand Mrs. Shadburne's case to the district court.

Also, in considering the interests of justice we consider the following. Although we do not have the papers before us that we would have in a direct appeal of the district court's order of December 27, 1993 staying all proceedings in this case, and we do not intimate that the said interlocutory order is appealable, absent something else the papers before us are sufficient to show that there is no bar to the district court proceeding in this case. The Trust requested that the United States Bankruptcy Court certify Mrs. Shadburne's claim for further litigation, which the bankruptcy court did on October 31, 1992, one year after our dismissal order. The Trust now raises in the district court the effect of our dismissal with prejudice on Mrs. Shadburne's claim, which it could have raised in the bankruptcy court prior to its said order of October 31, 1992. Dismissals with prejudice are subject to the usual rules of res judicata, which is an affirmative defense and must be pleaded or it is waived. Fed.

R. Civ. P. 8(c); 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2367 (1971). Res judicata, even in the dismissal with prejudice context, does not affect the jurisdiction of the district court. Rogin v. Bensalem Township, 616 F.2d 680, 684 n.11 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981).

It is accordingly ADJUDGED and ORDERED that the mandate in this case is recalled only insofar as it includes Mrs. Shadburne, and our said order of dismissal of October 24, 1991 is vacated only insofar as it includes Mrs. Shadburne. It is further ORDERED that Mrs. Shadburne's case be remanded to the United States District Court for the District of Maryland for further proceedings consistent with the bankruptcy court's October 31, 1992 order certifying Mrs. Shadburne's claim to proceed with litigation.

With the concurrence of Judge Chapman.

/s/ H. E. Widener, Jr.

For the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SUSAN SHADBURNE *

V. * CIVIL NO. K-83-160

DALKON SHIELD *
CLAIMANTS TRUST

MEMORANDUM AND ORDER

(1) The question has arisen as to whether this Court has jurisdiction in this case at this time to entertain a quest for relief by plaintiff concerning the status of the Fourth Circuit's Order of October 23, 1991, filed October 24, 1991, in this Court, and reflected in the docket sheet of this Court as of the date of October 28, 1991. In the context of the record in this case, this Court concludes that a final judgment was entered by the Fourth Circuit in October 1991, reflecting the termination in that Court of the judicial process in this case as of that date.

(2) Counsel for plaintiff has indicated that the dismissal by the Fourth Circuit in October 1991 of the appeal in this case was specifically not intended by plaintiff-appellant to disturb in any way the coverage of the applicable Oregon statute and of the then applicable existing Orders and the then possible future Orders (future in relation to October 1991) of the Bankruptcy Court. In that context, it is to be noted that in this case 42 appeals were filed by 42 different appellants, one of whom was plaintiff-appellant, and that the said 42 appeals were filed at the same time. Those appeals were filed from one Order in this case of Judge Northrop of

this Court to the Fourth Circuit. Subsequently, in October of 1991, one or more of those appeals, including the appeal of plaintiff, was dismissed by the Fourth Circuit, with prejudice. However, plaintiff takes the position that plaintiff had no intention of dismissing her appeal, with prejudice, and that the majority of the said 42 appeals were not dismissed with prejudice.

(3) Counsel for defendant, as of this date, takes the position that the record speaks for itself concerning what occurred in the Fourth Circuit and in this Court at one or more times including in October 1991, and reserves the right to take the position that a final Order exists in this case, that the judicial process has ended on a final basis, that plaintiff may not proceed further in this case and that that status should not be altered.

(4) Under the circumstances, in view of the existing record in the Fourth Circuit and in this Court, this Court is faced with what it presently construes to be a final October 1991, Order of the Fourth Circuit. If that status is not to prevail and to continue, it is the further present view of this Court that plaintiff must seek any relief plaintiff desires to obtain in the Fourth Circuit, and not in this Court. This Court understands that counsel on both sides also adopt that latter view and are in agreement with this Court that the best possible procedure is for the plaintiff promptly to seek clarification and relief in the Fourth Circuit if plaintiff desires to obtain any further relief in this case.

(5) Accordingly, this Court hereby stays all further action in this case in this Court until further advice from counsel on both sides in this case concerning future presentation to and action by the Fourth Circuit. This Court

requests that counsel on both sides file a joint written status report concerning the same by January 31, 1994.

(6) Copies of this Memorandum and Order are being mailed today to counsel of record.

(7) It is so ORDERED this 27th day of December, 1993.

/s/ Frank A. Kaufman

Senior United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 24, 1991

No. 85-1189

ADA JUNE TOLIVER; MAYLENE M. RICE; GERALD RICE; NANCY ROXBERG; DALE WALDO ROXBERG; SHIRLEY A. BAXTER; ROSELL MCGUFFIN; DAVID HARRY MCGUFFIN; DE ANN WELLER; NANCY RADIUS; DONALD MCCLOUD; MARGARET E. WITCHER; ROBIN GUARIGLIA; RALPH DAVID GUARIGLIA; CAROL JOHNSON; CURT R. JOHNSON; LINDA M. LAUDER; HAROLD LAUDER; SANDRA K. MCGRATH; RONALD MCGRATH; SUSAN SHADBURNE-VINTON; WILLIAM G. VINTON; ANN PINDAR; LAWRENCE PINDAR; GLORIA J. WAITS; DOUGLAS WAITS; VAL LAYCOCK-COWLES; DOUGLAS COWLES; DARLA J. CHANDLER; THOMAS CHANDLER; CAROL LYNN LUXFORD; DENNIS LYNN LUXFORD; SUSAN D. DIAMOND; ROBERT DIAMOND; NANCY ELAINE HAMILTON; BRUCE B. HAMILTON; SHERRI JANE HOWELL-COLEMAN; LIONEL COLEMAN; KATHY PHILPOTT; JUDITH HOY; LARRY K. HOY; GEORGIA C. MILLER

Plaintiffs - Appellants

v.

HUGH J. DAVIS, M.D.; DALKON SHIELD CLAIMANTS TRUST

Defendants - Appellees

ORDER

The parties have filed a stipulation of dismissal.

The Court dismisses this appeal pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, and each of the parties will bear their own costs. The Clerk of this Court will issue a certified copy of this order to the Clerk of the District Court as and for the mandate.

For the Court,

JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: DALKON SHIELD CASES	*	
ARLENE G. MADILL		M 82-3789
ADA JUNE TOLLIVER	*	B 82-3790
LINDA J. & ROY E. BLAIR		HM 82-3791
MAYLENE M. & GERALD RICE	*	HM 82-3792
NANCY & DALE WALDO ROXBERG		B 83-18
SHIRLEY A. BAXTER	*	JH 83-19
ROSELLA & DAVID HARRY McGUFFIN		K 83-20
DE ANN WEILER	*	M 83-21
NANCY RADIUS & DONALD McCLOUD		M 83-22
MARGARET E. WITCHER	*	HM 83-23
ROBIN & RALPH DAVID GUARIGLIA		M 83-155
CAROL & CURT R. JOHNSON	*	JH 83-157
LINDA M. & HAROLD LAUDER		B 83-158
SANDRA K. & RONALD McGRATH	*	HM 83-159
SUSAN SHADBURNE-VINTON & WILLIAM G. VINTON	*	M 83-160
ANN & LAWRENCE PINDAR		HM 83-161
CINDY A. & RICHARD HAVICE	*	M 83-162
GLORIA J. & DOUGLAS WAITS		HM 83-164
VAL & DOUGLAS LAYCOCK-COWLES	*	HM 83-165
DARLA & THOMAS CHANDLER		M 83-167
CAROL LYNN & DENNIS LYNN LUXFORD	*	HM 83-168
SUSAN D. & ROBERT DIAMOND	*	JH 83-169
NANCY ELAINE & BRUCE B. HAMILTON	*	B 83-1066

CAROLYN & RONALD MAXTED		M 83-1713
SHERRI JANE & LIONEL HOWELL-COLEMAN	*	B 83-2795
KATHY PHILPOTT	*	JH 83-4215
JUDITH & LARRY K. HOY		H 83-4216
GEORGIA C. MILLER	*	H 83-4328
Plaintiffs	*	
v.	*	
A. H. ROBINS COMPANY and HUGH J. DAVIS, M.D.	*	
Defendants	*	

Filed: December 20, 1984

Michael A. Pretl, Esquire and Pretl & Schultheis, of Baltimore, Maryland, counsel for the plaintiffs.

Charles P. Goodell, Jr., Esquire, Susan T. Preston, Esquire, and Richard M. Barnes, Esquire, all of Semmes, Bowen & Semmes, of Baltimore, Maryland, counsel for defendant A.H. Robins Company; Deborah E. Jennings, Esquire and Piper & Marbury, of Baltimore, Maryland, counsel for defendant Hugh J. Davis, M.D.

NORTHROP, Senior United States District Judge

MEMORANDUM

On June 1, 1984, this Court granted summary judgment in Pottratz v. Davis, ___ F. Supp. ___, No.

HM 83-163 (D.Md., filed June 1, 1984) on the grounds that the action was barred by an Oregon statute of repose, ORS § 30.905, and by the doctrine of res judicata. On August 15, 1984, plaintiffs' motion for reconsideration en banc was denied, and counsel was directed to identify other pending actions in this Court which may be subject to summary judgment in accordance with the June 1, 1984 opinion and order.

On September 13, 1984, by joint memorandum, the defendants designated 28 additional actions in which they argue summary judgment should be entered on the dual grounds that: (1) all claims therein are barred by the Oregon statute of repose, and (2) prior judgments in 15 of these actions also bar the claims under the doctrine of res judicata. Plaintiffs filed a memorandum in opposition and defendants have replied. No hearing is necessary. Local Rule 6.

In order to facilitate discussion and to promote clarity, the 28 cases are arranged in three groups. The first group, comprising 15 actions, involves plaintiffs who have had summary judgment entered against them in the United States District Court for the District of Oregon on the ground that each claim was time-barred under ORS § 30.905. The second group contains seven cases that, while not barred by res judicata, are nevertheless time-barred under ORS § 30.905. One case, discussed in a footnote in this second group, contains a material issue of fact. The third and final group of cases involves plaintiffs in five actions where there are allegations implicating multiple states and raising questions regarding the applicability of the Oregon statute.

I.

In 15 actions the United States District Court for the District of Oregon entered summary judgment against the plaintiffs on the basis of *ORS § 30.905*. As the Pottratz opinion noted, the summary judgment entered by Judge Belloni in those cases is a final adjudication on the merits and bars a relitigation of the underlying facts. Pottratz v. Davis, ___ F. Supp. ___, ___, No. HM 83-163, slip op. at 9-10 (D.Md., filed June 1, 1984) (hereinafter sometimes referred to as the "Pottratz opinion"). This same conclusion applies with equal force to and is completely dispositive of the following actions where summary judgment has already been entered: Tolliver (B 82-3790); Rice (HM 82-3792); Roxberg (B 83-18); McGuffin (K 83-20); Radius (M 83-22); Witcher (HM 83-23); Guariglia (M 83-155); Lauder (B 83-158); McGrath (HM 83-159); Pindar (HM 83-161); Waits (HM 83-164); Laycock-Cowles (HM 83-165); Chandler (M 83-167); Luxford (HM 83-168); and Philpott (JH 83-4215).[17/]

Plaintiffs attempt to avoid res judicata by arguing that their respective facts are different than those in Pottratz, and thus, the Oregon statute of repose is inapplicable. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment at p. 5. The answer to this argument is that in each case, plaintiff had an opportunity to litigate her facts before the United States District Court for the District of Oregon. After reviewing those facts, Judge Belloni ruled

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17/ See Exhibits A-N to Defendants' Joint Memorandum in Support of Summary Judgment. Those exhibits are copies of Judge Belloni's order granting summary judgment against plaintiffs in the above-listed cases.

the actions time-barred under ORS § 30.905 and held: "There are no factors which require a result different from Philpott v. A.H. Robins Co., Inc., [710 F.2d 1422 (9th Cir. 1983)], and Dortch v. A.H. Robins Co., Inc., 59 Or. App. 310, 659 P.2d 1046 (1982)." This res judicata bar precludes plaintiffs from having a second chance at raising an argument concerning the applicability of ORS § 30.905.

By separate Order, summary judgment will be granted in favor of defendants in the above-listed cases.

II.

In Pottratz, this Court concluded that Oregon statute ORS § 30.905 is an ultimate statute of repose and that no cause of action accrues unless a plaintiff learns of a causal connection between her injuries and the Dalkon Shield within eight years of its purchase. Pottratz v. Davis, ___ F. Supp. ___, ___, No. HM 83-163, slip op. at 8 (D.Md., filed June 1, 1984). Application of this principle to the seven cases discussed below reveals that all are time-barred by the Oregon statute.

Plaintiffs object to the application of the Oregon statute by arguing that while they may not have made a connection between the Dalkon Shield and their injuries within the appropriate time frame, there are allegations of physical injury within the eight-year period set forth in ORS § 30.905. Plaintiffs argue further that these allegations of physical injury distinguish all other cases from Pottratz, and give rise to a factual dispute as to when the injury actually occurred.

The plaintiffs' argument does not withstand legal analysis. It is true that the below-discussed cases differ from

Pottratz in that there are allegations of physical injury occurring prior to the expiration of the eight-year period; occurrence of physical injury, alone, however, is not enough -- the injury which must occur within the eight-year period is the legal injury, i.e., "a physical injury which the plaintiff knows or as a reasonable person should know was caused by the defendant." Dortch v. A.H. Robins Co., Inc., 59 Or. App. 310, 650 P.2d 1046, 1051 (1982); Philpott v. A.H. Robins Co., Inc., 710 F.2d 1422, 1425 (9th Cir. 1983). "If plaintiff does not discover the defendant's causal connection until after the eighth year, no cause of action accrues within eight years and the claim is barred." Dortch, 650 P.2d at 1052-53; Philpott, 710 F.2d at 1425. Thus, the question is not when a physical injury is alleged to have occurred, but, rather, when the "legal injury" -- the causal connection -- is alleged to have been discovered.

This is clearly the sense in which "injury" was used in the Pottratz opinion. See, Pottratz v. Davis, ___ F. Supp. ___, ___, No. HM 83-163, slip op. at 8 (D.Md., filed June 1, 1984). Indeed, this conclusion is buttressed by the fact that in both the underlying decisions of Pottratz, Dortch and Philpott, there were allegations of physical injury within the eight-year period. Dortch, 650 P.2d at 1047 and Philpott, 710 F.2d at 1425. The allegations were not deemed legally significant because plaintiffs did not "discover the causal connection [between their injuries and the Dalkon Shield] until after the eighth year . . ." Dortch, 650 P.2d at 1052-53; Philpott, 710 F.2d at 1425.

As stated, application of this legal injury analysis and ORS § 30.905 to the undisputed facts of the cases discussed below, reveals that the defendants are entitled to summary judgment as a matter of law.

1. Johnson, JH 83-157

The following facts are undisputed: Plaintiff, a resident and citizen of Oregon, purchased and inserted the Dalkon Shield on August 17, 1971. Complaint ¶¶ 1, 29. Physical disorder or injury was experienced in June, 1972 and September, 1978. Complaint ¶¶ 30, 32. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until August, 1980 (Complaint ¶ 38), more than eight years after purchase.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905 and as discussed above, plaintiff's claims are time-barred.[18/]

2. Diamond, JH 83-169

The following facts are undisputed: Plaintiff, a resident and citizen of Oregon, purchased and inserted the Dalkon Shield in May, 1971. Complaint ¶¶ 1, 29. Physical disorder or injury was experienced in March, 1972 and September, 1976. Complaint ¶¶ 30, 31. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until April, 1981 (Complaint ¶ 36), more than eight years after purchase.

18/ Johnson is one of three cases pending in the District of Oregon, without final disposition. The other cases are Baxter, JH 83-19, and Diamond, JH 83-169.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.

3. Hamilton, B 83-1066

The following facts are undisputed: Plaintiff, a resident and citizen of Oregon, purchased and inserted the Dalkon Shield in June, 1972. Complaint ¶ 1, 28. Physical disorder or injury was experienced in June and July, 1976. Complaint ¶¶ 29, 30. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until 1981 (Complaint ¶ 34), more than eight years after purchase.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.

4. Howell-Coleman, B 83-2795

The following facts are undisputed: Plaintiff, a resident and citizen of Oregon, purchased and inserted the Dalkon Shield on April 1, 1972. Complaint ¶¶ 1, 34. Physical disorder or injury was experienced in April, 1972 and August, 1978. Complaint ¶ 36. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until September, 1980 (Complaint ¶ 40), more than eight years after purchase.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.

5. Hoy, H 83-4216

The following facts are undisputed: Plaintiff, a resident and citizen of Oregon, purchased and inserted the Dalkon Shield on June 23, 1972. Complaint ¶¶ 1, 34. Physical disorder or injury was experienced in August, 1973. Complaint ¶¶ 37-39. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until early 1983 (Complaint ¶ 41), more than eight years after purchase.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.

6. Miller, H 83-4328

The following facts are undisputed: Plaintiff, a citizen and resident of Oregon, purchased and inserted the Dalkon Shield on March 13, 1973. Complaint ¶¶ 1, 33. Physical disorder or injury was experienced in 1974 and 1976. Complaint ¶¶ 35-37. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until October, 1983, more than eight years after purchase.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.

7. Baxter, JH 83-19

The following facts are undisputed: Plaintiff, a citizen and resident of Oregon, purchased and inserted the Dalkon Shield on June 23, 1972. Complaint ¶¶ 1, 28. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until "the summer of 1980." Complaint ¶ 33. Plaintiff admits in her brief in opposition to

the summary judgment motion filed in the District of Oregon litigation that "only after the eight year period of ORS § 30.905 had run that she discovered defendant's causal involvement in her injury." Exhibit O Defendant's Memorandum in Support of Summary Judgment at p. 2.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.[19/]

It should be noted at this juncture that application of the legal injury analysis to the 15 cases determined ante to be barred by res judicata would produce the same results. Every one of the fifteen cases alleges knowledge of the causal connection between the Dalkon Shield and plaintiffs' injuries outside of the eight-year period.

III.

The final group of cases is comprised of five actions in which Oregon is but one of two states mentioned by plaintiffs in their complaints. The issues to be determined in

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19/ One other case that logically belongs in this second group is Blair, HM 82-3791. Defendants argue that Ms. Blair learned of the causal connection between her injuries and the Dalkon Shield in "the summer of 1980, more than eight years after purchase." Defendants' Joint Memorandum at p. 13. Nothing in the record of Blair supports that factual allegation. Accordingly, a material fact, i.e. the date of legal injury, remains in dispute, and summary judgment in Blair is inappropriate at this time.

these cases are whether the substantive law of Oregon applies and, if so, whether ORS § 30.905 bars the suit under the legal principles discussed and applied above. In order to address these issues, the facts of each case must be analyzed.

1. Weiler, M 83-21

The following facts are undisputed: The Dalkon Shield was purchased and inserted on March 8, 1973 in Eugene, Oregon. Complaint ¶¶ 1, 28. After physical complications, the Dalkon Shield was removed in July, 1974 in Eugene, Oregon. Complaint ¶ 29. In July, 1981, more than eight years after purchase, plaintiff alleges she first became aware of the nature and cause of her injuries while hospitalized in Milwaukie, Oregon. Complaint ¶¶ 31, 34. Plaintiff is now a citizen and resident of Colorado. Complaint ¶ 1.

Defendants argue that the present residence in Colorado is immaterial, that Oregon law applies, and that ORS § 30-905 bars this suit. This Court agrees. "The injury [to plaintiff] occurred in Oregon because that is where the Dalkon Shield was inserted and used by the plaintiff." Pottratz v. Davis, ___ F. Supp. ___, ___, No. HM 83-163, slip op. at 9 (D.Md., filed June 1, 1984). Thus, the substantive law of Oregon applies.

Since plaintiff did not discover the causal connection between her injuries and the Dalkon Shield within the eight-year period mandated by ORS § 30.905, plaintiff's claims are time-barred.

2. Shadburne-Vinton, M 83-160

The following facts are undisputed: Plaintiff, a citizen and resident of Oregon, purchased and inserted the second of two Dalkon Shields on March 1, 1974, in Portland, Oregon. Complaint ¶¶ 1, 29. Physical injury or disorder was experienced in March, 1974, December, 1976, and January, 1977, in Portland, Oregon. Complaint ¶¶ 31, 33. Plaintiff has been employed in Portland, Oregon since at least 1976. Complaint ¶ 36. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until she was "hospitalized at Cedars-Sinai Hospital in Los Angeles, California, between March 30 and April 4, 1982, with a diagnosis of chronic salpingitis." Complaint ¶ 38.

Plaintiff argues that she "was injured and treated in California, and as the Pottratz opinion did not consider the effect out-of-state treatment might have on the determination of the place of injury, summary judgment pursuant to Pottratz is inappropriate." Plaintiff's Memorandum in Opposition to Summary Judgment at p. 7.

The cause of action in this case arose in Oregon "because that is where the Dalkon Shield was inserted and used by the plaintiff." Pottratz v. Davis, supra, slip op. at 9. Oregon law applies, and ORS § 30.905 bars this suit since no legal injury occurred within eight years of purchase of the Dalkon Shield. The fact that plaintiff discovered the causal connection between her injuries and the Dalkon Shield while in California on March 30, 1982, beyond the eight-year period, is immaterial. Her later discovery cannot toll the statute or revive claims already barred.

3. Madill, M 82-3789

4. Havice, M 83-162

5. Maxted, M 83-1713

In the remaining cases, the Dalkon Shield was purchased and inserted outside the State of Oregon.[20/] Pottratz differs significantly from these cases because in Pottratz, "the injury to Mrs. Pottratz occurred in Oregon because that is where the Dalkon Shield was inserted and used by the plaintiff." Pottratz v. Davis, supra, slip. op. at 9 (emphasis added). Plaintiffs thus contend that Pottratz is not controlling because every event in these cases did not occur in Oregon. Defendants recognize this distinction but argue that Oregon law is still applicable because every event subsequent to purchase, including use, physical injury and discovery of causal connection, occurred in Oregon.

The conceptual problem in these cases is not "when" the injury occurred, but rather "where" the legal injury occurred. If the legal injury is deemed to have occurred in Oregon, these cases are barred by ORS § 30.905 because in each one, plaintiff did not discover a causal connection between her injuries and the Dalkon Shield within eight years. If, on the other hand, the legal injury occurred in the states where the Dalkon Shield was purchased and inserted, ORS § 30.905 is not applicable and will not bar these suits.

20/ The Dalkon Shield was purchased and inserted by plaintiff Madill in Florida, by plaintiff Havice in Montana, and by plaintiff Maxted in California.

Since Pottratz dealt only with the issue of when, not where, the legal injury arose, this Court holds, as plaintiffs suggested, that Pottratz is not controlling in these cases. There still remains an issue as to where the legal injury arose. Resolution of that issue will require analysis of more facts than are stated in the instant complaints, as well as a choice of law analysis as between Oregon law and that of the state of purchase. Accordingly, with respect to Madill, Havice and Maxted, defendants' motion for summary judgment will be denied, without prejudice, subject to renewal at the appropriate time.

IV.

In conclusion, language from the Pottratz decision is appropriate:

> Plaintiffs' losses are recognized and regretted by this Court. This Court further recognizes that other Dalkon Shield plaintiffs will be able to maintain actions in this Court, yet the instant plaintiffs will not. However, it is simply an unfortunate by-product of our federal-state system and the Erie doctrine that victims of common disasters and users of the same or similar products may be treated differently because of varying state laws.

Id., slip op. at 15.

A separate Order confirming the within rulings will be entered.

/s/

Edward S. Northrop
Senior United States District Judge

Dated: 20 December 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: DALKON SHIELD CASES	*	
ARLENE G. MADILL		M 82-3789
ADA JUNE TOLLIVER	*	B 82-3790
LINDA J. & ROY E. BLAIR		HM 82-3791
MAYLENE M. & GERALD RICE	*	HM 82-3792
NANCY & DALE WALDO ROXBERG		B 83-18
SHIRLEY A. BAXTER	*	JH 83-19
ROSELLA & DAVID HARRY McGUFFIN		K 83-20
DE ANN WEILER	*	M 83-21
NANCY RADIUS & DONALD MCLOUD		M 83-22
MARGARET E. WITCHER	*	HM 83-23
ROBIN & RALPH DAVID GUARIGLIA		M 83-155
CAROL & CURT R. JOHNSON	*	JH 83-157
LINDA M. & HAROLD LAUDER		B 83-158
SANDRA K. & RONALD McGRATH	*	HM 83-159
SUSAN SHADBURNE-VINTON & WILLIAM G. VINTON	*	M 83-160
ANN & LAWRENCE PINDAR		HM 83-161
CINDY A. & RICHARD HAVICE	*	M 83-162
GLORIA J. & DOUGLAS WAITS		HM 83-164
VAL & DOUGLAS LAYCOCK-COWLES	*	HM 83-165
DARLA & THOMAS CHANDLER		M 83-167
CAROL LYNN & DENNIS LYNN LUXFORD	*	HM 83-168
SUSAN D. & ROBERT DIAMOND	*	JH 83-169
NANCY ELAINE & BRUCE B. HAMILTON	*	B 83-1066
CAROLYN & RONALD MAXTED		M 83-1713
SHERRI JANE & LIONEL HOWELL-COLEMAN	*	B 83-2795
KATHY PHILPOTT	*	JH 83-4215

JUDITH & LARRY K. HOY		H 83-4216
GEORGIA C. MILLER	*	H 83-4328
Plaintiffs	*	
v.	*	
A. H. ROBINS COMPANY and HUGH J. DAVIS, M.D.	*	
Defendants	*	

ORDER

The Memorandum of Judge Northrop filed herewith having been considered by each of the nine judges of this Court who have Dalkon Shield cases pending before them; and each of the undersigned judges having further considered the memoranda filed by the parties herein; and the undersigned judges having all agreed with the findings and conclusions reached by Judge Northrop in the attached Memorandum; and each of the undersigned judges having further determined that Judge Northrop's rulings should be applied in the cases listed herein; IT IS, this 20th day of December, 1984, by the United States District Court for the District of Maryland, ORDERED;

1. That the joint motion for summary judgment filed by defendants A.H. Robins Co. and Hugh J. Davis, M.D., BE, and the same hereby IS, GRANTED, in the following cases:

a. Tolliver, B 82-3790
b. Rice, HM 82-3792
c. Roxberg, B 83-18
d. Baxter, JH 83-19
e. McGuffin, K 83-20
f. Weiler, M 83-21
g. Radius, M 83-22
h. Witcher, HM 83-23

i. Guariglia, M 83-155
k. Lauder, B 83-158
m. Shadburne-Vinton, M 83-160
o. Waits, HM 83-164
q. Chandler, M 83-167
r. Luxford, HM 83-168
t. Hamilton, B 83-1066
v. Philpott, JH 83-4125
w. Hoy, H 83-4216
j. Johnson, JH 83-157
l. McGrath, HM 83-159
n. Pindar, HM 83-161
p. Laycock-Cowles, HM 83-165
s. Diamond, JH 83-169
u. Howell-Coleman, B 83-2795
x. Miller, H 83-4328

2. That judgment BE, and the same hereby IS, ENTERED in favor of the defendants against the plaintiffs in the above-listed actions;

3. That the Clerk of Court enter the above-listed cases as CLOSED on the Court's docket;

4. That the joint motion for summary judgment filed by defendants A.H. Robins Co. and Hugh J. Davis, M.D., BE, and the same hereby IS, DENIED, without prejudice, in the following cases:

a. Madill, M 82-3789
b. Blair, HM 82-3791
c. Havice, M 83-162
d. Maxted, M. 83-1713

5. That the Clerk of Court shall place a copy of this Order and the foregoing Memorandum Opinion in each of cases cited in paragraphs 1 and 4 above; and

6. That the Clerk of Court shall mail copies of this Order and the foregoing Memorandum Opinion to counsel in these cases.

/s/ Frank A. Kaufman
Frank A. Kaufman
Chief Judge

/s/ Joseph H. Young
Joseph H. Young
Judge

/s/ Edward S. Northrop
Edward S. Northrop
Senior Judge

/s/ Herbert F. Murray
Herbert F. Murray
Judge

/s/ Alexander Harvey II
Alexander Harvey II
Judge

/s/ Joseph C. Howard, Jr.
Joseph C. Howard, Jr.
Judge

/s/ James R... Miller, Jr.
James R. Miller, Jr.
Judge

/s/ Waler E. Black, Jr.
Walter E. Black, Jr.
Judge

/s/ John R. Hargrove
John R. Hargrove
Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 19, 1995

No. 94-1820
CA-83-160-K

SUSAN SHADBURNE-VINTON
Plaintiff - Appellant

and

WILLIAM G. VINTON
Plaintiff

v.

DALKON SHIELD CLAIMANTS TRUST
Defendant - Appellee

OREGON TRIAL LAWYERS ASSOCIATION; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA; THE AMERICAN INSURANCE ASSOCIATION
Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing in Banc

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Appellees filed a petition for rehearing with suggestion for rehearing in banc.

Judge Widener voted to grant panel rehearing. Judges Russell and Chapman voted to deny.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Widener and Hall voted to rehear the case in banc, and Judges Ervin, Russell, Wilkins, Hamilton, Niemeyer, Luttig, Michael and Motz voted against rehearing in banc. Judges Murnaghan, Wilkinson and Williams recused themselves.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Chapman for the Court.

For the Court,

/s/ Bert M. Montague

CLERK

STATUTORY PROVISIONS

ORS 30.905:

Time limitation for commencement of action. (1) Notwithstanding ORS 12.115 or 12.140 and except as provided in subsection (2) of this section and ORS 30.907 and 30.908 (1) to (4), a product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption.

(2) Except as provided in ORS 30.907 and 30.908 (1) to (4), a product liability civil action shall be commenced not later than two years after the date on which the death injury or damage complained of occurs.

Or. Laws 1987 c.4 §§ 5-10:

SECTION 5. Notwithstanding ORS 30.905, a product liability civil action against the manufacturer of an intrauterine contraceptive device shall be commenced not later than two years after the date on which the plaintiff first discovered, or in the exercise of reasonable care should have discovered, the injury and the cause of the injury.

SECTION 6. Section 5 of this Act applies to all causes of action tried after the effective date of this Act.

SECTION 7. Section 5 of this Act is repealed on July 1, 1989. The repeal of section 5 of this Act by this section does not affect an action described in section 5 of this Act that is filed before July 1, 1989.

SECTION 8. A product liability civil action against the manufacturer of an intrauterine contraceptive device that has been dismissed may be refiled within one year of the effective date of this Act, regardless of when the cause of action accrued, if:

(1) the action was dismissed solely on the ground that it was barred by ORS 30.905 (1); and

(2) The action was dismissed on or after July 1, 1977.

SECTION 9. Notwithstanding ORS 30.905 (1), a product liability civil action against the manufacturer of an intrauterine contraceptive device that was first purchased for use eight years or more before the effective date of this Act may be commenced within one year of the effective date of this Act if the action has never before been commenced.

SECTION 10. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

Or. Laws 1989 c.642 §§ 2, 4:

Sec. 2. The statutes of repose in ORS 12.115, 30.905 (1) or any other statute of repose contained in Oregon Revised Statutes shall not apply to a product liability civil action against a manufacturer of an intrauterine device, resulting in IUD-related injuries.

Sec. 4. This Act applies to any product liability civil action against the manufacturer of an intrauterine device resulting from IUD-related injuries which is tried, arbitrated or settled after the effective date of this Act [July 6, 1989],

even if such an action has already been dismissed, so long as the dismissal is based on a previous version of the applicable statute of limitations or repose. This Act shall also apply to any product liability civil action against a manufacturer of an intrauterine device currently pending in the trial court or on appeal, in which the defendant manufacturer has raised the statute of limitations or repose as a defense. Any such action in which final judgment has been entered in favor of the manufacturer based solely on a previous version of the statute of limitations or repose may be refiled within one year of the effective date of this Act.